Filed 6/7/16 In re K.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.M., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. K.B. et al., Defendants and Appellants.	E064662 (Super.Ct.No. SWJ1100756) OPINION

APPEAL from the Superior Court of Riverside County. Donal B. Donnelly, Judge. (Judge of the Imperial Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jack A. Love, by appointment of the Court of Appeal, for Defendant and Appellant K.B.

Grace Clark, by appointment of the Court of Appeal, for Defendant and Appellant R.M.

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman, and Carole Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

K.B. (mother) and R.M. (father) appeal from an order terminating their parental rights to their daughter K.M. (sometimes child), who is now seven. They contend that, based on the relationship between the mother and K.M., the juvenile court was required to find that the "beneficial parental relationship" exception to termination of parental rights (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)) applied. We will conclude that the juvenile court could reasonably find that this exception did not apply. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Initial Dependency Petition.*

In October 2011, when the child was three, it was reported that the parents were long-time methamphetamine users and that the mother was unable to care for the child because she was chronically ill. Upon investigating, a social worker found the family home packed full of boxes, some stacked "precariously," and infested with roaches. Accordingly, the Department detained the child and filed a dependency petition regarding her.

In January 2012, the juvenile court found that it had jurisdiction based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).)

In January 2013, at the 12-month hearing, the juvenile court placed the child back with the mother; it ordered family maintenance services for the mother and reunification services for the father.

In October 2013, dependency jurisdiction was terminated.

B. *"Reactivated" Dependency Petition*.

On October 29, 2013, it was reported that the parents were using drugs and failing to care for the child.

In November 2013, a social worker tried to contact the family twice, but without success.

In December 2013, the social worker contacted the child at her school. Her hands and clothes were dirty, her hair was "disheveled," and her shoes were on the wrong feet. She said that she walked to and from school alone because "her parents are always sick and laying down to watch television."

In December 2013 and January 2014, a social worker tried to contact the family four more times, still without success.

On January 10, 2014, the social worker made two unannounced visits, one to the home and one to the child's school. Each resulted in a brief confrontation with the father, who refused to talk to the social worker and asked her to leave the family alone.

On January 22, 2014, when the child was five, the Department filed a "reactivated" dependency petition regarding her, under the same case number as the previous petition. The next day, the Department detained the child at her school and placed her with the same foster family as before.

The mother refused to be interviewed. The father was interviewed, but he denied using drugs or alcohol or neglecting the child in any way. Initial drug tests of both parents were negative.

In February 2014, at the jurisdictional/dispositional hearing, both parents submitted on the social worker's reports. The juvenile court sustained allegations that the child had "poor hygiene," that the home was "cluttered," and that the parents "continue[d] to use controlled substances"; it asserted jurisdiction based on failure to protect. (Welf. & Inst. Code, § 300, subd. (b).) It formally removed the child from the parents' custody, and it ordered them to participate in reunification services.

The father did not comply with his reunification services plan.

The mother completed counseling, parenting classes, and a psychological assessment, as her reunification services plan required. However, the Department continued to have "concerns about the quality of visitation."

The mother was also required to submit to substance abuse testing. From July 2014 through April 2015, her test results were negative, except as follows. On three

separate occasions in July 2014, she either failed to show up or failed to produce urine.[1] In September 2014, one specimen had an invalid pH, most likely due to tampering. In February 2015, she tested positive for alcohol "at a very high level."

In March 2015, the mother's cousin, J.M., who lived in Texas, contacted the Department. She said that she and her husband T.V. were "willing and able" to adopt K.M. She added that, in 2011, they had had K.M. in their home for several weeks under a temporary guardianship. In the initial dependency, they had been approved as a placement for K.M., though ultimately K.M. had been placed back with the parents instead. The trial court ordered the Department to start the interstate placement process.

In May 2015, at the 12-month hearing, the juvenile court terminated reunification services and set a section 366.26 hearing.

In June 2015, with the juvenile court's permission, J.M. took the child on a one-week trip to Hawaii. After the trip, the child went back to Texas with J.M.'s family. She was formally placed with the family in July 2015.

In October 2013, at the section 366.26 hearing, the juvenile court found that K.M. was adoptable and that termination of parental rights would not be detrimental. Accordingly, it terminated parental rights.

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[1] In July 2014, the Department received an anonymous report that the mother was on a "drinking binge."

II

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

A. *Additional Factual and Procedural Background.*

The evidence before the juvenile court at the section 366.26 hearing consisted of two specified social worker's reports — one of which incorporated by reference an earlier ex parte application by the Department — plus the mother's oral testimony. We confine our review to this evidence (see Welf. & Inst. Code, § 366.26, subd. (b)), which showed the following.

The parents had "a history of problematic visitation . . . . They ha[d] a history of failure to parent the child during visitation, and visits were completely lacking in quality." After visits, the child had "extreme behavior issues . . . ."

At one point, the mother had had supervised visitation twice a week. In May 2015, however, reunification services were terminated and her visitation was reduced to once a month.

On June 18, 2015, the mother had a final visit with K.M. in anticipation of her move to Texas. This visit lasted only 20 minutes.

In July 2015, K.M. was placed with J.M. When she first arrived, she was having tantrums; she would hit and scratch. Since then, however, her behavior had "greatly improved." The prospective adoptive parents made use of positive reinforcement as well as time-outs. K.M. "ha[d] bonded with the caretakers who [we]re very committed to her

and wish[ed] to adopt her." She called the prospective adoptive parents "mom" and "dad" and said she would like to live with them.

While in Texas, K.M. had two phone calls with the mother. "During the first call . . . , she acted as though she did not know who the mother was[] and did not wish [to] talk to her mother. She acted out a lot after this first phone call and hit, bruised, and scratched the caretaker." However, when a social worker asked her if she wanted to talk to the mother again in the future, she said yes. In that social worker's view, it was to be "expected" that K.M. might act out, partly because she had not talked to the mother in a while and partly because she had a new mother figure in her life, "which may be confusing for her."

Before the second phone call, K.M. said "she did not wish to speak to her parents and . . . she would hang up on them." During the call, "[s]he was meek and hesitant and very quiet . . . ." "Directly after, and throughout the week after . . . , [she] acted out sexually . . . and was very aggressive and disrespectful. She . . . hit, bit, punched, and pinched the caretakers . . . ."

According to the mother, during one of these phone calls, K.M. said she loved the mother and asked if the mother could come over and play.

B. *Discussion.*

"Adoption is the Legislature's preferred permanent plan. [Citation.]" (*In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Thus, as a general rule, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights.

(Welf. & Inst. Code, § 366.26, subds. (b)(1) & (c)(1).) There is an exception to this rule, however, if "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" (*id.*, subd. (c)(1)(B)) for one of six specified statutory reasons. (*Id.*, subd. (c)(1)(B)(i)-(vi).) One such reason is that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i).)

"The 'benefit' prong of th[is] exception requires the parent to prove his or her relationship with the child 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citations.]" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) "'To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination.' [Citation.]" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

"'Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] . . . .'" [Citation.]" (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.)

It is not entirely clear whether we review the trial court's finding on this issue under a substantial evidence standard or an abuse of discretion standard. (See generally *In re K.P., supra,* 203 Cal.App.4th at pp. 621-622.) But "[t]he practical differences between the two standards of review are not significant. '[E]valuating the factual basis

for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . .'" [Citations.]" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Here, there was no evidence that the mother's relationship with the child tended to promote the child's well-being. According to the social worker's reports that were before the juvenile court, both parents' visitation was "problematic" and "completely lacking in quality." In arguing otherwise, the mother relies on earlier reports that were not introduced into evidence at the section 366.26 hearing. As already noted, we cannot consider them.

Separately and alternatively, there was affirmative evidence that the relationship was detrimental to the child — namely, that before the two phone visits, K.M. did not want to talk to the mother, and after the two phone visits, K.M.'s behavior deteriorated drastically. Indeed, as the mother herself concedes: "It could be argued that it was detrimental for [K.M.] to have contact with her mother because she acted out negatively afterwards." The mother nevertheless argues that "it would be expected that [K.M.] would act out after a phone call with mother considering she had not been able to talk to her mother in a while and might be confused." Even assuming it might be *expected* that K.M. would be "confused," such "confus[ion]" was still evidence of *detriment*.

Moreover, the record belies the mother's argument; it shows that, even when the mother was still visiting regularly, K.M. already had "extreme behavior issues" after visits.

Meanwhile, K.M. was thriving in her prospective adoptive placement. Her behavior had "greatly improved." She had bonded with the prospective adoptive parents, and she said that she wanted to live with them.

The mother argues that she is in a Catch-22: K.M. acted out after visits, and the Department cites this as evidence that she did not have a beneficial relationship with the mother; yet, if K.M. had not acted out after visits, the Department would still be citing that as evidence she did not have a beneficial relationship with the mother. K.M.'s acting out, however, did not stand alone. In addition, the quality of the mother's previous visitation was reportedly poor, and K.M. was resistant to talking to the mother on the phone. If the mother's previous visitation had been nurturing, and if K.M. had been eager to talk to the mother, the trial court might have viewed K.M.'s acting out in a different light. In any event, if two reasonable inferences could be drawn from the fact that K.M. was acting out, the choice of inference was up to the trial court. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

In sum, then, a reasonable judge could conclude that the mother did not carry her burden of showing that termination of parental rights would be detrimental to the child.

III

DISPOSITION

The order appealed from is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.